Supreme Court, U.S.
FILED
DEC 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-921

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CARL E. WIDELL & SONS,
Petitioner

v.

RICHARD AND ANNIE ELLISON AND
UNDERWOOD MEMORIAL HOSPITAL AND
TRANSPORTATION INSURANCE COMPANY OF CNA
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Eric S. Plaum, Esquire
Suite 1200
Two Penn Center Plaza
Philadelphia, PA 19102
(215) 988-9444
Attorney for Respondents,
Richard Ellison & Annie Ellison

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

BEST AVAILABLE COPY

18pp

QUESTION PRESENTED FOR REVIEW

Will this Court consider on a Petition for Writ of Certiorari a factual review of an issue involving an alleged fraud argument pursuant to Fed. R. Civ. P. 60(b)(3) which was considered by the District Court, found to be meritless, scandalous and vexatious, and which was affirmed by the Court of Appeals for the Third Circuit in a Judgment Order.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING A WRIT OF CERTIORARI	3
CONCLUSION	6
APPENDIX	A-1
"Motion to Strike and Expunge Appendix "A" of Defendant, CARL E. WIDELL & SON, INC.'S Brief and Motion for Contempt."	A-1
"Plaintiffs' Response to Motion for New Trial of Defendant, CARL E. WIDELL & SON, INC."	A-6

TABLE OF AUTHORITIES

Cases:	Page
BUNCH v. U.S, 680 F.2d 1271 (9th Cir. 1982) . . .	4
H. K. PORTER CO., INC. v. GOODYEAR TIRE & RUBBER CO. 536 F.2d 1115 (6th Cir. 1976) .	5
ROZIER v. FORD MOTOR CO., 573 F.2d 1332 (5th Cir. 1978)	5
SAENZ v. KENEDY, 178 F.2d 417 (5th Cir. 1949)	5
Statutes and Rules:	
28 U.S.C. §1254	1
28 U.S.C. §1927	3
Supreme Court Rule 49.2	6
Fed. R. Civ. P. Rule 60	i, 2, 4, 5

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard Ellison and Annie Ellison respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 13, 1985 from which a request for rehearing was denied on September 30, 1985.

OPINIONS BELOW

Richard Ellison and Annie Ellison accept as accurate petitioner's statement concerning opinions below.

JURISDICTION

This Brief in Opposition to the Petition for Writ of Certiorari is being filed within the prescribed thirty (30) day period following December 2, 1985. Jurisdiction of this Court has been invoked by petitioner under 28 U.S.C. §1254(1).

COUNTERSTATEMENT OF THE CASE

Respondents', Richard Ellison and Annie Ellison, instituted this action to recover damages for personal injuries sustained by plaintiff, Richard Ellison, against the petitioner, Carl E. Widell & Sons, Inc., (Widell) on September 30, 1981. Richard Ellison had been sent by his employer, S. D. Richman & Sons, to Widell's business premises for the purpose of obtaining a load of scrap metal. The scrap metal was placed into Richard Ellison's open body tractor-trailer by means of a hook-type crane. This crane was owned by Widell and was being operated by an employee of Widell, John Dickerson. At the end of the loading process, while Ellison was inspecting the loaded trailer, John Dickerson negligently dropped the

crane's block and hook upon Ellison's person, causing it to crush his right hand.

During the pre-trial discovery stage, a 5½ page statement purportedly taken from John Dickerson by an unknown insurance company adjuster was produced by Widell. Subsequent thereto, John Dickerson was subpoenaed for a discovery deposition. Then, it was learned from Mr. Dickerson's psychiatrist that he had a severe emotional illness and any attendance at either a deposition or trial could be highly detrimental to him. As a result thereto, all counsel stipulated that Mr. Dickerson would be an unavailable witness.

Thereafter, Ellisons' counsel attempted to depose all employees of Widell who may have had any knowledge of the herein accident. On November 22, 1982, Edward Toal, an officer of Widell corporation, was deposed at which time he denied personal knowledge of the accident and having any conversation with the crane operator concerning it.

A jury trial was held from May 24, 1983 through June 2, 1983 which resulted in a verdict wherein Widell was found to be 100% negligent and the Ellisons' were awarded damages. Respondent's counsel subpoenaed Edward Toal as a witness and learned on the evening prior to his testimony that he had been discharged by Widell and wanted to recant his deposition testimony concerning an admission of fault by the unavailable crane operator. Mr. Toal was called as a witness and recanted his prior testimony at deposition. Mr. Toal also testified that prior to speaking with Ellisons' counsel and testifying in court that he personally informed Widell's counsel of the true facts which were within his knowledge, to which he ultimately testified. Widell introduced no evidence in its defense of this case nor was any attempt made to introduce the crane operator's statement.

On June 9, 1983, Widell filed its Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. No separate Rule 60(b) Motion was filed. On

March 15, 1984, Widell filed its Brief in support of its post trial motions at which time it improperly attempted to have the unsworn, unauthenticated 5½ page statement of the crane operator made part of the trial record by attaching it as an appendix to its Brief.

On March 22, 1984, respondents filed "Plaintiffs' Motion to Strike and Expunge Exhibit "A" of Defendant Carl E. Widell & Sons, Inc's Brief and Motion for Contempt."[1]

On June 25, 1984, the trial court entered a Memorandum and Order wherein the statement was stricken from the record, and fined Widell's counsel $100.00 pursuant to 28 U.S.C. §1927. The trial court, sua sponte, also ruled that there was no evidence of any fraud in the case, thereby disposing of Widell's proffered argument.

On appeal to the United States Court of Appeals for the Third Circuit, Widell raised nine (9) issues, one of which was "The Trial Court Erred In Not Considering The Fraud Argument Proffered In Defendant's Motion For New Trial." On August 13, 1985, the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the judgment of the District Court. Widell filed a Petition for Rehearing which was denied by the Third Circuit on September 30, 1985.

REASONS FOR DENYING A WRIT OF CERTIORARI

It is the position of the respondents, Richard Ellison and Annie Ellison, that this case is not one which requires the exercise of this Court's extraordinary and discretionary jurisdiction. There was no departure by either the District Court or the United States Court of Appeals for the Third Circuit from any accepted and usual course of judicial proceedings.

The Petitioner seeks to have this Court review a factual matter which was reviewed by the District Court

1. No motion was ever filed by the Ellisons' seeking to strike Widell's Rule 60(b) argument.

and affirmed by the Third Circuit, which is not the function of this Court.

Petitioner argues that the District Court and the Third Circuit did not consider Petitioner's Motion for relief from judgment based upon Fed.R.Civ.P. 60(b)(3). This position is totally frivolous, contradicted by the record and without any merit. The District Court considered Widell's argument and correctly disposed of it in its Memorandum and Order dated June 25, 1985 (SEE: PET. APPENDIX AT 14a-16a).

The June 25, 1984, Memorandum and Order was rendered by the District Court as a result of its granting of the Ellisons' Motion to Expunge John Dickerson's extra-judicial statement from the record (RES. APPENDIX AT A-1 to A-5). The District Court was in possession of Widell's Brief in support of its post trial motions, reviewed the extra-judicial statement against the testimony asserted at trial, and, sua sponte, ruled that there was not even a scintilla of evidence that any fraud or wrongdoing had been committed.

The trial court characterized counsel for Widell's Rule 60(b) argument as being a scandalous allegation of fraud, absent of any justification. The court found that the conduct of Widell's counsel was "vexatious and intended to multiple these proceedings unreasonably." (PET. APPENDIX AT 15a). As a sanction for such improper behavior, the trial court levied a fine upon counsel for Widell.

The finding of the trial judge that there was no evidence of fraud was not an abuse of discretion. It is the Petitioner's burden under Fed.R.Civ.P., Rule 60(b)(3) to establish by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct *and* establish that the misconduct complained of prevented defendant from fully and fairly presenting its defense. See *BUNCH v. U.S.*, 680 F.2d 1271, 1283 (9th Cir. 1982). A motion under Rule

60(b)(3) is aimed at judgments which were unfairly obtained, not those which are factually incorrect. *ROZIER v. FORD MOTOR CO.*, 573 F.2d 1332, 1339 (5th Cir. 1978). Fraud can never be presumed and must always be proven by clear and convincing evidence. *SAENZ v. KENEDY*, 178 F.2d 417, 419 (5th Cir. 1949). It is a serious charge and ought not to be made without substantial support. *H.K. PORTER CO., INC. v. GOODYEAR TIRE AND RUBBER CO.*, 536 F.2d 1115, 1118-1119 (6th Cir. 1976)

On appeal to the United States Court of Appeals for the Third Circuit, Widell raised an issue that the trial court never considered its fraud argument proffered in its Motion for New Trial. Counsel for Widell attempted to obfuscate the truth even further by now contending that the Motion to Expunge Exhibit "A" (John Dickerson's statement) to Widell's Brief was a motion to strike the fraud argument. The motion filed by the Ellisons' never sought to strike Widell's fraud argument, but only to protect the record. (RES. APPENDIX AT A-1 to A-5). The Third Circuit Court of Appeals considered Widell's fraud argument, amongst others, and entered a Judgment Order disposing of all nine (9) of Widell's arguments.

The instant Petition of Widell again evidences its blatant lack of candor by mischaracterizing the Motion to Strike and, for the first time, making a scandalous, untrue allegation that the Ellisons' never denied Widell's averments of fraud. Nothing could be further from the truth. The averment of fraud was denied by the Ellisons in subparagraph "M" in their response to the Motion for New Trial of Petitioner Widell. (RES. APPENDIX AT A-6 to A-7).

The Petition for a Writ of Certiorari is without any basis, scandalous and frivolous. The District Court heard the fraud argument proffered by Widell and properly disposed of it upon the merits. The Third Circuit gave full consideration to the issues raised on appeal, including

this fraud argument and disposed of the appeal by entering only a Judgment Order. There are no grounds for the granting of a Writ of Certiorari. Accordingly, the Petition for Writ of Certiorari should be denied and the respondents' should be awarded damages pursuant to Supreme Court Rule 49.2.

CONCLUSION

Based upon the foregoing reasons, respondents', Richard Ellison and Annie Ellison, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

BY:_____

ERIC S. PLAUM, ESQUIRE
Suite 1200
Two Penn Center Plaza
Philadelphia, PA 19102
(215) 988-9444
Attorney for Respondents,
RICHARD ELLISON &
ANNIE ELLISON

Dated: December 20, 1985

MANCHEL, LUNDY, LESSIN & BUSACCA
BY: ERIC S. PLAUM
IDENTIFICATION NO. 19413 ATTORNEY FOR PLAINTIFF
EIGHTH FLOOR, ROBINSON BUILDING
42 SOUTH 15th STREET
PHILADELPHIA, PA. 19102
LOcust 3-7630

RICHARD ELLISON and ANNIE ELLISON

vs

CARL E. WIDELL & SON, INC. and UNDERWOOD MEMORIAL HOSPITAL

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-0297

MOTION TO STRIKE AND EXPUNGE APPENDIX "A" OF DEFENDANT, CARL E. WIDELL & SON, INC.'S BRIEF AND MOTION FOR CONTEMPT

1. Movants herein are Plaintiffs and Plaintiffs' counsel, Eric S. Plaum

2. At all times pertinent and relevant hereto, John J. O'Brien Jr. was and still is attorney for the Defendant, Carl E. Widell & Son, Inc. and General Accident Insurance Company and acted as their joint agent, servant and employee, acting within the course and scope of his authority and employment.

3. This is an action brought against Defendant, Widell, for injuries sustained by Plaintiff, Richard Ellison.

4. The herein case was tried before the Honorable J. William Ditter and a jury commencing on May 24, 1983.

5. On June 2, 1983, the jury found Defendant Widell 100% negligent and awarded verdicts for Plaintiff,

Richard Ellison and Annie Ellison in the respective amounts of $285,000.00 and $30,000.00 each.

6. Defendant Widell was afforded the opportunity to present any evidence it deemed probative or relevant to any issue related to the trial herein.

7. Defendant Widell did not introduce any evidence, nor did Defendant attempt to introduce any evidence at the trial herein and thereby denied Plaintiff of rebuttal argument.

8. During the course of the trial, a former employee of Defendant, Edward Toal, recanted certain testimony which he testified to during a deposition concerning conversations with Defendant's crane operator. (N.T. 3-89)

9. Previous to testifying, the witness, Edward Toal, informed defense counsel and said Defendant's corporate president, Nelson Widell of the conversation which is at issue. (See N.T. 3-90 & 91 which is attached as Exhibit "A" hereto).

10. The Defendant has filed a Motion for Judgment Notwithstanding the Verdict, or, in the alternative, a Motion for a New Trial.

11. Defendant attached a 5½ page statement (herein referred to as "statement") purporting to be a statement by Defendant's crane operator which is identified as Appendix "A" to Defendant's brief.

12. The "statement" was never introduced at trial herein nor did the trial court render any ruling pertaining to its admissibility.

13. The "statement" is not probative for any purpose.

14. The "statement" is not part of the trial record.

15. Defense counsel has attempted to make a document which was never admitted, authenticated or subject to any examination or cross-examination, a part of the record which is improper and the "statement" should be stricken from the record.

16. Further, Defendant has accused Plaintiffs' counsel of "perpetrating a fraud on the court" because Plaintiffs' counsel introduced testimony by Edward Toal

which the defense knew was truthful and of which the Defendant and counsel had actual prior knowledge. (See Exhibit "A" attached).

17. Defendant's counsel's remarks concerning Plaintiffs' counsel are scandalous, impertinent and false accusations, without even a scintilla of evidence in the record to support such accusations. It is an accusatory conjecture that springs full blown from a heart of malice and a mind indulgent in malevolence.

18. DR 7-102 provides:

> (A) In his representation of a client, a lawyer shall not:
>
> > (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
> >
> > (5) Knowingly make a false statement of law or fact.

19. Defense counsel's actions are in violation of DR 7-102 as he had prior knowledge of the "full" facts surrounding this case, the deposition testimony of the witness, Mr. Toal, and of what Mr. Toal was about to say, prior to its being received into evidence by the court.

20. Defense counsel's remarks are malicious harassment in its purest sense.

21. DR 7-106 (c) provides:

> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> > (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

22. Defense counsel's actions are in violation of DR 7-106 as he has resorted to arguing matters that (a) were not part of the record, (b) for which there is no evidence to support, and (c) maligned and defamed Plaintiffs' and Plaintiffs' counsel without any proper or lawful evidence to support such accusations while hiding behind claims of privilege.

23. 28 U.S.C. §1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

24. In the instant case, Defendant's counsel now has unreasonably attempted to raise matters not appearing of record and introduce documentary evidence at the post-trial motion stage which, if it was to be introduced at all, should have been introduced at trial by the Defendant which is improper and violative of our laws and disciplinary rules.

WHEREFORE, Plaintiffs and Plaintiffs' counsel respectfully request that this Honorable Court strike Appendix "A" from the Brief in Support of Defendant, Carl E. Widell & Son, Inc's Motion for Judgment N.O.V., or, in the alternative, Motion for New Trial and hold counsel

for Defendant in contempt for violation of DR 7-102 and 7-106 subjecting Defendant to costs, expenses and reasonable attorney's fees.

Respectfully submitted,

MANCHEL, LUNDY, LESSIN & BUSACCA

BY:_____

ERIC S. PLAUM
Attorney for Plaintiffs

MANCHEL, LUNDY, LESSIN & BUSACCA
BY: ERIC S. PLAUM
IDENTIFICATION NO. 19413 ATTORNEY FOR PLAINTIFFS
EIGHTH FLOOR, ROBINSON BUILDING
42 SOUTH 15th STREET
PHILADELPHIA, PA. 19102
LOcust 3-7630

RICHARD ELLISON and
ANNIE ELLISON

vs

CARL E. WIDELL & SON,
INC. and UNDERWOOD
MEMORIAL HOSPITAL
TRANSPORTATION
INSURANCE COMPANY
OF CNA

UNITED STATES
DISTRICT COURT FOR
THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO.
82-0297

PLAINTIFFS RESPONSE TO MOTION FOR NEW TRIAL OF DEFENDANT, CARL E. WIDELL & SON, INC.

The Plaintiffs, Richard Ellison and Annie Ellison, desire to oppose the Motion for New Trial of the Defendant hereby respond in corresponding paragraphs:

(a) denied.
(b) denied.
(c) denied.
(d) denied.
(e) denied.
(f) denied.
(g) denied.
(h) denied.
(i) denied.
(j) denied.
(k) denied.

(l) denied.
(m) denied.
(n) denied.
(o) denied.
(p) denied.
(q) denied.
(r) denied.
(s) denied.
(t) denied.
(u) denied.
(v) denied.
(w) No answer required as written.

Plaintiffs respectfully submit that defendant is not given any extension of time in which to file any additional reasons.

MANCHEL, LUNDY, LESSIN & BUSACCA

By_____
ERIC S. PLAUM, ESQUIRE
Attorney for Plaintiffs